



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Taft Broadcasting Corporation  
File: B-222818  
Date: July 29, 1986

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### DIGEST

1. Protest that awardee's proposal failed to comply with the Service Contract Act because awardee failed to offer to pay its employees the minimum wages specified is denied when there is no evidence that awardee offered to pay its employees wages which did not meet the minimum required.
2. Allegation that awardee's proposal should be rejected because awardee did not propose a labor force with the exact skill mix utilized by the incumbent protester and pay those employees commensurate wages is denied since RFP did not impose any such requirement.
3. Protest that agency improperly cured a deficiency in the awardee's cost proposal by increasing probable direct labor costs to reflect the fact that awardee would retain a substantial number of the incumbent's employees and would be required to pay those employees their current wages is denied since agency's evaluation of an offeror's proposed costs provides a more reliable estimate for evaluation purposes in a cost-type contract and where cost is considered in the award, agency's increase of an offeror's overall costs does not demonstrate favoritism towards that offeror.
4. Protest based on information provided to protester at debriefing filed with GAO more than 10 working days after debriefing is untimely.
5. Allegation that major weaknesses identified by agency in awardee's proposal should have had a greater impact on agency's overall ranking of the awardee is denied where record evidences a reasonable basis for agency to conclude that strengths in other areas justified agency's rating.
6. GAO does not review affirmative determinations of responsibility absent a showing of fraud or bad faith on the part of procuring officials or the misapplication of a definitive responsibility criteria.
7. Protest that National Aeronautics and Space Administration (NASA) is improperly continuing negotiations with only selected offeror is denied. Procurement was conducted under NASA procurement procedures under which "discussions" are limited essentially to proposal clarification after

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which a contract is "negotiated" with a selected offeror. Final negotiation process is intended to rectify correctible errors to ensure contract award on the most favorable terms to the government and negotiations being conducted are consistent with this authority.

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## DECISION

Taft Broadcasting Corporation protests the award of a contract to Stellacom, Inc., under request for proposals (RFP) No. 9-BG32-28-5-95P issued by the National Aeronautics and Space Administration (NASA). The RFP is for the procurement of support services including management, engineering operations and maintenance of the television system and equipment at the Johnson Space Center, Houston, Texas. System operations include video recording of test and training activities, video productions and release of video signals to the broadcast networks. Engineering services include system design, assembly, installation and testing of television equipment. Taft, the incumbent contractor, argues that Stellacom's proposal should have been rejected because it failed to comply with the Service Contract Act (SCA). Also, Taft argues that proposals were not properly evaluated. In addition, Taft alleges that Stellacom is not a responsible offeror and that NASA is improperly continuing negotiations with only Stellacom.

We deny the protest in part and dismiss it in part.

The RFP was issued on September 18, 1985, and four proposals were received by the November 18, 1985, closing date for receipt of proposals. Proposals were evaluated by a Source Evaluation Board (SEB) and, after the initial evaluation, only the proposals submitted by Taft and Stellacom were found to be in the competitive range. Under the RFP, proposals were evaluated based on Mission Suitability factors, Cost, Company Experience, Past Performance and Other Factors. Mission suitability and cost were considered most important and were of approximately equal weight. Company experience and past performance were somewhat less important and the other factors identified in the RFP were considerably less important.

Both Taft and Stellacom participated in discussions and each offeror was afforded an opportunity to submit revised proposals. The SEB reevaluated the technical proposals and Stellacom received the highest score in mission suitability and was rated a "high" good overall while Taft was rated a "low" good overall. In addition, the SEB found that Stellacom's proposed and probable costs were significantly lower than Taft's. Under company experience, Stellacom was rated "good" while Taft was rated "excellent." Stellacom's past performance was rated "good" while Taft was rated "poor" and both firms received a "satisfactory" rating with respect to other factors. The Source Selection Officer (SSO) reviewed the results and selected Stellacom for negotiations leading to an award based primarily upon its higher mission suitability score and lower proposed and probable costs.

Taft's protest was filed with our Office on April 14, 1986. NASA conducted a debriefing informing Taft of the areas of its proposal which were judged to be weak or deficient and the basis for its selection of Stellacom on April 18. Taft then supplemented its protest on April 18. Award has been withheld pending the resolution of this protest.

#### Service Contract Act

Taft indicates that the RFP required proposals to be submitted based upon 177,480 direct labor manhours, the direct labor hour classifications set forth and the breakout for each respective labor classification. Because NASA significantly increased Stellacom's total direct labor costs in its cost evaluation, Taft argues that Stellacom's proposal must have violated the SCA and that its offer was therefore illegal. Taft contends that Stellacom's proposal should have been excluded from the competitive range for this reason and that NASA should not have "unilaterally cured" Stellacom's deficiencies in this area by increasing Stellacom's probable costs.

In addition, Taft alleges that it understood the RFP to require the same staffing profile as is currently utilized by Taft in performing the contract. Taft argues that Stellacom's proposal was deficient insofar as it allocated lower skilled employees to positions currently filled by Taft with higher skilled employees. Taft contends that Stellacom's proposal should have been rejected on this basis. Taft also contends that Stellacom's response showed a complete lack of understanding of the difficulty and importance of the RFP requirements.

NASA argues that the SCA only requires the payment of minimum wages to certain classifications of labor after contract award and that payment of the specified wages is required regardless of what labor rates are actually proposed by the offeror. In addition, NASA indicates that Stellacom's proposal complied with the minimum wage determination for the respective classifications and that in no instance did Stellacom offer to pay a wage rate lower than that required by the SCA.

Also, NASA argues that the RFP did not require Stellacom to utilize the same staffing profile as currently employed by Taft in performing the contract and that Stellacom proposed to accomplish certain functions with less skilled employees than those employed by Taft. However, because NASA assumed that Stellacom, if awarded the contract, would retain a substantial number of Taft's employees and would be required to pay those employees their current wages, NASA increased Stellacom's direct labor costs to take this factor into account. Moreover, NASA points out that after its cost adjustment, there was no significant difference between the total direct labor costs proposed by either offeror and that the overall cost disparity was due to Taft's significantly higher overhead expenses.

Based on our review of the record, we see no evidence that Stellacom's proposal was noncompliant with the SCA. In any event, we have held that even where an offeror has proposed rates which are below those specified in the appropriate wage determination, that offeror may nonetheless be eligible for award since such an offer does not necessarily show an intent to violate the SCA. QAO Corp., B-211803, July 17, 1984, 84-2 CPD ¶ 54. Furthermore, whether Stellacom performs this contract in accordance with the SCA is a matter for the Department of Labor, which is responsible for the enforcement of the Act. Starlite Services, Inc., B-210762, Mar. 7, 1983, 83-1 CPD ¶ 229.

In addition, we disagree with Taft's assertion that NASA cured a deficiency in Stellacom's proposal by raising its probable costs for direct labor or that this action resulted in any unequal treatment of Taft. We note that this contract is a cost-plus-award-fee level of effort contract and we have consistently stated our view that, generally, some form of price or cost analysis should be made in connection with cost reimbursement contracts. Ecology and Environment, Inc., B-209516, Aug. 23, 1983, 83-2 CPD ¶ 229. An offeror's estimated costs should not be considered controlling since estimates may not provide valid indicators of the cost to the government and an agency should examine an offeror's proposed costs in sufficient depth to arrive at a more reliable "should cost" estimate for evaluation purposes. Triple A Shipyards, B-213738, July 2, 1984, 84-2 CPD ¶ 4. This is precisely what NASA did in this case in determining that Stellacom's actual direct labor costs would be greater. We fail to see how an agency's cost evaluation, which increases an offeror's overall costs, is any indication of favoritism towards that offeror.<sup>1/</sup>

Furthermore, we see nothing in the RFP which required Stellacom to propose the same staffing profile as that currently utilized by Taft in performing the contract. The RFP provided offerors with the manhour requirements for various functional classifications (e.g., lead television technician) and the SCA wage determination specified the minimum hourly by wages for various classes of employees (e.g., Senior technician, 1st class technicians, 2nd class technicians, etc.).

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<sup>1/</sup> Taft also asserts that it has a well-established record of negotiating cost reductions and that its higher overhead was due to requirements of the SCA. NASA indicates that it made no adjustments to Taft's overall costs because NASA considered them realistic. To the extent Taft is alleging it could have lowered its price, it should have done so in its proposal. Also, while certain employee fringe benefits are covered by the SCA, there is no requirement in the SCA that an offeror charge the government a specified amount for general and administrative expenses or other overhead costs.

Stellacom determined that employees with comparatively lower skill levels and commensurate lower wages than those proposed by Taft could meet the functional classifications specified, and we see nothing in the RFP which precluded Stellacom from doing so. See 58 Comp. Gen. 551 (1979); 54 Comp. Gen. 562 (1975); Global Assoc., B-212820, Apr. 9, 1984, 84-1 CPD ¶ 394. Although the RFP called for the continuation of the same services, this imposed no obligation on offerors to utilize employees with skill levels identical to that of the incumbent, especially since the RFP did not provide offerors with that information.

Finally, we disagree with Taft that Stellacom's actions necessarily demonstrated a lack of understanding of the RFP requirements. The RFP did not specify that the skill level of current Taft employees represented the necessary minimum for each respective classification. NASA determined that the skill mix of Stellacom's proposed labor force was acceptable, and we see no basis to question NASA's position on this issue.

#### Technical Evaluation

At the bid protest conference on May 29, Taft raised several specific issues concerning NASA's technical evaluation of both Taft's and Stellacom's proposals. Taft alleged that NASA's rating of Stellacom's mission suitability score as "high good" and Taft's as "low good" is clearly unreasonable in view of Taft's excellent 22-year performance record with NASA. Taft takes issue with each of the following major weaknesses identified by NASA: Taft did not provide a clear well-defined configuration control procedure for engineering projects; Taft's division of management responsibility was weak; Taft's alleged failure to adequately address the operation of a television facility; the lack of long-term planning by Taft's project manager; and the lack of related education and experience on the part of some key personnel. Taft argues that NASA's evaluation of its past performance as poor was unreasonable and that it is incomprehensible that NASA gave Taft only a slight edge over Stellacom in experience. Taft complains that NASA failed to point out these alleged weaknesses during discussions and contends that the relative cost difference between the proposals would be eliminated had NASA conducted a proper cost realism study.

In addition, Taft argues that the deficiencies identified by NASA in Stellacom's proposal are far more significant since they involve specific requirements of the RFP. Stellacom was downgraded for failure to describe the generation and control of television signals in a multi-channel network and was criticized because its proposed project manager lacked education and experience in engineering management. Taft alleges that these criticisms, unlike those of Taft, go to the very heart of the project and should have had a more serious detrimental impact on Stellacom's overall evaluation.

We find Taft's allegations concerning NASA's technical evaluation to be untimely. The record shows that at the debriefing on April 18, NASA advised Taft of the ranking of both proposals in each respective category, as well as the fact that Taft's proposed and evaluated costs were higher than Stellacom's. In this regard, NASA's debriefing memorandum indicates that Taft was advised of the specific weaknesses which NASA found in Taft's technical proposal and NASA's conclusions regarding the evaluation of Taft's and Stellacom's key personnel, company experience and past performance. Taft did not object to NASA's conclusion in these areas or complain that these issues should have been the subject of discussions until the May 29 bid protest conference and first submitted these allegations to our Office in writing on June 2. Under our Bid Protest Regulations, protests must be filed within 10 working days of the date the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1986). Since these issues were not raised until more than 1 month after the debriefing, they are untimely and will not be considered on the merits.

Taft does not dispute that it was provided this information at the debriefing, but argues that its supplemental protest filing dated April 18, set forth these bases for protest and that Taft has simply added additional factual detail and legal analysis to support its allegations. Taft contends that under our Bid Protest Regulations, technical forms of pleading are not required and that the filing of supplemental materials whenever new facts are made available are contrary to the intent of the regulations.

Taft's April 18 protest letter does allege that NASA improperly evaluated the proposals and indicates Taft's belief that NASA should have discussed the weaknesses in its proposal which were identified. However, no additional details were submitted and, in our view, the specific allegations subsequently raised by Taft are not within the scope of its April 18 protest. See ALM, Inc., B-221230.3 et al., Mar. 11, 1986, 86-1 CPD ¶ 160. We point out that our Bid Protest Regulations contemplate a statement which sufficiently apprises the agency of the specific aspects of the procurement to which the protester objects and we have dismissed protests for failure to state a basis for protest where the protester has merely expressed a general disagreement with the agency's evaluation. GTT Industries, Inc., B-220824, Nov. 5, 1985, 85-2 CPD ¶ 527; ALM, Inc., supra. Despite Taft's assertion that our Regulations do not contemplate the filing of extensive supplemental material, we note that we have issued numerous decisions which specifically recognize that a protester may delay the filing of its protest until it is apprised of the specific reasons why its proposal was not selected at the debriefing. Organization Systems, Inc., B-220146, Oct. 31, 1985, 85-2 CPD ¶ 498; Raytheon Support Services Co., B-219389.2, Oct. 31, 1985, 85-2 CPD ¶ 495.

Accordingly, since Taft was advised at the debriefing of the ranking of both Taft's and Stellacom's proposals in each respective evaluation category and NASA's cost assessment of each proposal, Taft was required to raise its specific objections concerning NASA's evaluation within 10

working days of the debriefing. Since Taft did not protest these issues until the conference and its post conference submissions, more than 1 month later, they are untimely and will not be considered.

It does appear, however, that Taft was not apprised of the two major weaknesses NASA identified in Stellacom's proposal until receipt of the administrative report which contained a copy of NASA's source selection statement. Therefore, Taft's allegations concerning the impact of these deficiencies on Stellacom's evaluation are timely and will be considered. In considering this allegation, we note that it is not the function of our Office to determine independently the acceptability or relative technical merit of proposals. Georgetown Air & Hydro Systems, B-210806, Feb. 14, 1984, 84-1 CPD ¶ 186. Procuring officials have a reasonable degree of discretion in conducting an evaluation, and we therefore determine only whether the evaluation was arbitrary, that is unreasonable or in violation of procurement laws or regulations. Joule Engineering Corp.--Reconsideration, B-217072.2, May 23, 1985, 85-1 CPD ¶ 589.

NASA identified two major weaknesses in Stellacom's proposal; the failure to describe the generation and control of television signals in a multi-channel network and the proposed project manager's lack of education and experience in engineering management. NASA considered these deficiencies in formulating Stellacom's overall rating and despite these weaknesses, determined that Stellacom's overriding strengths in a number of other evaluated areas justified rating Stellacom's overall proposal as a "high good." Stellacom's proposal was evaluated excellent in four of the scored criteria and good in the remaining four. In comparison, Taft was rated excellent in two criteria, good in two criteria and fair in the remaining four. NASA determined that Stellacom's technical response demonstrated an understanding of the requirements and the ability to meet those requirements. Stellacom's project manager, although lacking in the area of engineering management, was found to have a good educational background and experience for general management functions. Although Taft contends that Stellacom should have been scored lower because of these weaknesses, we find that NASA has established a reasonable basis for its overall evaluation of Stellacom's proposal.

Finally, we note that Taft has also alleged that Stellacom's proposal should have been rejected because it failed to include adequate provisions for the maintenance of a computerized security system and the equipment which receives television signals from space. Essentially, Taft argues that these functions involved unique equipment which no company other than the current subcontractors have available and that the RFP required offerors to continue these contracts. Taft alleges that Stellacom failed to indicate in its proposal how it would maintain this equipment or whether the current subcontracts would be continued. NASA indicates that continuation of the current subcontracts was not required by the RFP although it was considered likely. As a result, NASA increased Stellacom's probable costs to reflect the current subcontract

costs for the maintenance of these items. We agree with NASA that the RFP did not require offerors to continue the current subcontracts and, accordingly, we find no basis to object to Stellacom's failure to include them in its proposal. Moreover, to the extent Taft believed the RFP imposed this requirement and offered to continue these contracts, we note that NASA's adjustment of Stellacom's cost in this area resulted in both firms being evaluated on the same basis.

#### Responsibility

Stellacom is a joint venture formed within the past year and Taft argues that the two firms comprising Stellacom each employed approximately 15 people and that their combined average unsecured credit did not exceed \$7,500. Taft argues that the current RFP calls for expenditures between \$4.5 and \$5 million with corresponding credit requirements. Taft contends that the work to be performed is critical and NASA should not be assigning those responsibilities to a start-up joint venture. Taft argues that Stellacom should therefore be found nonresponsible.

Our Office does not review protests against affirmative determinations of responsibility unless there is a showing of possible fraud or bad faith on the part of procuring officials or of a possible failure to apply definitive responsibility criteria contained in a solicitation.

Washington State Commission for Vocational Education--Reconsideration, B-218249.2, July 19, 1985, 85-2 CPD ¶ 59. In making the award, the contracting officer made an affirmative determination of Stellacom's responsibility and since neither fraud, bad faith or misapplication of definitive criteria has been alleged, we will not consider this issue. Olympic Container Corp., B-219424, July 24, 1985, 85-2 CPD ¶ 83; Fauconniere Mfg. Corp., B-219593, July 23, 1985, 85-2 CPD ¶ 75.

#### Continuing Negotiations

Taft argues that NASA is improperly continuing negotiations with only Stellacom and that NASA has no authority for this extraordinary procedure. Taft recently received additional information requested under the Freedom of Information Act (FOIA) which Taft contends demonstrates that NASA is still negotiating various critical issues with Stellacom. Taft argues that NASA has improperly negotiated a reduction in manning levels of more than 10 percent, negotiated changes in Stellacom's proposed interface chart, reassigned individuals on Stellacom's organization chart and negotiated changes in Stellacom's "Configuration Management and Documentation" which Taft asserts was of great importance to NASA in evaluating Taft's mission suitability. As a result, Taft argues that the nature of the procurement has changed significantly and that NASA should either reopen negotiations with both Taft and Stellacom or issue a new solicitation.

We point out that NASA conducted this procurement under its alternate source selection procedures, 48 C.F.R. § 1815.617-71 (1984), and in accordance with its Source Selection Board Manual (NHB 5103.6). Section

15.613 of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.613 (FAC 84-5, Apr. 1, 1985), permits the use of these procedures and we have recognized these procedures as one legitimate approach to meeting the requirement of 10 U.S.C. § 2304 (1982) for written and oral discussions in negotiated procurements.<sup>2/</sup> Under these procedures, "discussions" are essentially limited to clarification of proposals, after which a contract is negotiated with the selected offeror. Support Systems Assocs., Inc., B-215421, Sept. 4, 1984, 84-2 CPD ¶ 249; Program Resources, Inc., B-192964, Apr. 23, 1979, 79-1 CPD ¶ 281. Thus, we find no basis to object to the fact that NASA is conducting final negotiations with only Stellacom.

Furthermore, Taft's allegation that the scope of the procurement has changed significantly is not persuasive. If NASA has indeed negotiated a 10 percent reduction in manning levels, we do not find that this constitutes such a material change outside the scope of the original RFP which would mandate the issuance of a new solicitation. Cf. Wayne H. Coloney Co., Inc., B-215535, May 15, 1985, 85-1 CPD ¶ 545. With respect to the alleged changes in Stellacom's proposal negotiated by NASA, we note that the final negotiation process is intended to rectify correctable weaknesses identified in the evaluation process so that the resulting contract is on the most favorable terms to the government. See NHB 5103.6. The final negotiations may include the selected offeror's technical approach, management arrangement and estimated costs and, in our view, NASA is clearly authorized to negotiate the types of changes being made to Stellacom's proposal.

Finally, we note that based on the documents received under its FOIA request, Taft also alleges that Stellacom failed to submit cost proposals for the fourth and fifth contract years. This allegation is based upon a NASA request, subsequently withdrawn, that Stellacom provide cost proposals, with cost and pricing data, for those periods. Taft argues that the RFP required this information and that Stellacom's failure to comply with this requirement should have been considered a major weakness.

Under the RFP, offerors were requested to provide a first year basis contract price, two 1-year firm-priced options and two 1-year unpriced options. For the unpriced options, the RFP (L-12) indicated that only budget estimates should be provided and the record indicates that Stellacom provided this information for evaluation purposes. Apparently, NASA requested Stellacom to submit more comprehensive cost information for these two years after Stellacom was selected, but subsequently decided that this information was not necessary. Stellacom provided the information required by the RFP and we find no basis to conclude that Stellacom's proposal was noncompliant in this regard.

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<sup>2/</sup> Taft has alleged that NASA should have obtained a formal waiver permitting NASA to deviate from the FAR. This allegation is without merit since 48 C.F.R. § 15.613 does not require a waiver.

Moreover, concerning Taft's allegation that failure to comply with this requirement constituted a major weakness, we point out that the unpriced options were evaluated as one of the "other factors" under the evaluation scheme rather than under cost. "Other factors" were of considerably less importance than mission suitability and cost and in view of NASA's overall evaluation, we fail to see where any change in Stellacom's evaluation rating in this area would impact on NASA's selection decision.

The protest is denied in part and dismissed in part.

*for Seymour Efron*  
Harry R. Van Cleve  
General Counsel